Supreme Court, U.S.
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No. 02-1577

IN THE

SUPREME COURT of the UNITED STATES

CITY OF COMBES, TEXAS, et al.,
Appellants

vs.

EAST RIO HONDO WATER SUPPLY CORPORATION, et al.,
Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(THREE JUDGE COURT)

MOTION TO AFFIRM

J. W. DYER
Counsel of Record
SHARON ALMAGUER

DYER & ASSOCIATES
3700 N. 10th, Suite 105
McAllen, Texas 78501
(956) 686-6606
(956) 686-6601 Fax
dyerfirm@aol.com

Attorneys for Appellees

May 2003

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION TO AFFIRM 1

STATEMENT OF THE CASE 1

THE QUESTION PRESENTED IS NOT SUBSTANTIAL 2

ARGUMENT 3

I. East Rio Hondo Water Supply Corporation is not a Political Subdivision within the meaning of Section 5 of the Voting Rights Act. 3

II. Summary Judgment was Appropriate 9

CONCLUSION 8

TABLE OF AUTHORITIES

CASES — Page

Monsanto v. Cornerstone Mun. Utility Dist., 865 S.W. 2d 937, (Tex. 1993) 7

Moore v. Caledonia Nat. Gas Dist., 890 F. Supp. 547 (N.D. Miss. 1995) 4

Op. Atty. Gen. 1995, No. JM-011 ..... 6, 7

Smith v. Salt River Project Agr. Imp. and Power Dist., 109 F.3d 586 (9th Cir. 1997) 4

State of Texas v. U.S., 866 F. Supp. 20 (D.D.C. 1994) 4

Tarrant County Water Supply Corp. v. Hurst-Euless Bedford Ind. Sch. Dist., 391 S.W. 2d 162 (Tex. Civ.App.–Fort Worth 1965, writ ref'd n.r.e.) ... 6, 7

STATUTES

TEX. CIV. PRAC. & REM. CODE § 101.001 (West 2003) 8

TEX. GOV'T. CODE § 551.001, et seq. (West 2003) 2, 7

TEX. GOV'T. CODE § 552.001, et seq. (West 2003) 2, 7

TEX. PROP. TAX CODE § 11.11 (West 2003) 8

TEX. REV. CIV. STAT., art. 1396-1.01, et seq. (West 2003) . 5

TEX. WATER CODE § 13.002 (West 2003) 5

TEX. WATER CODE § 15.001 (West 2003) 6

TEX. WATER CODE § 16.001 (West 2003) 6

TEX. WATER CODE § 17.001 (West 2003) 6

TEX. WATER CODE § 67.001, et seq. (West 2003) 5

TEX. WATER CODE § 67.002 (West 2003) 8

TEX. WATER CODE § 67.005 (West 2003) 5

TEX. WATER CODE § 67.007 (West 2003) 5

TEX. WATER CODE § 67.009 (West 2003) 8

TEX. WATER CODE § 67.010 (West 2003) 8

TEX. WATER CODE § 67.011 (West 2003) 8

TEX. WATER CODE § 67.0105 (West 2003) 8

VOTING RIGHTS ACT OF 1965, § 5, as amended,
42 U.S.C.A. § 1973c 1

MOTION TO AFFIRM

Pursuant to the Rules of this Court, Appellees move to affirm the judgment sought to be reviewed because it is apparent that the question on which the decision of the case depends is so unsubstantial as to not require plenary consideration. The decision of the district court is based on a sound analysis of the undisputed facts of this case and well-settled law. There is no conflict which requires this Court's resolution.

STATEMENT OF THE CASE

Appellants brought this case under Section 5 of the Voting Rights Act ("Section 5 of the Act") seeking to enjoin Appellee, East Rio Hondo Water Supply Corporation ("the Corporation"), from conducting the election of its Board of Directors unless, and until, the Corporation obtained preclearance of its election procedures. 42 U.S.C.§ 1973c. (Docket Entry 1, Plaintiffs' Complaint). The Corporation's election procedures are stated in its bylaws. (Docket Entry 15, Statement of Agreed and Disputed Material Facts). Appellants' case centers on the question of whether the Corporation is a "political subdivision" covered by Section 5. Appellants' argument in the district court was premised on the theory that because certain Texas statutes defined the Corporation as a "political subdivision" and the Corporation was subject to the Texas Open Meetings Act and Texas Open Records Act, then, according to Appellants, the Corporation must be treated as a "political subdivision" covered by Section 5 of the Act. This theory is consistently repeated throughout Appellants' briefing and argument to the district court. (Docket Entry 8, Motion for Preliminary Injunction) (Docket Entry 17, Plaintiff's Pretrial Memorandum). The district court correctly

rejected Appellants' argument and found that, when viewed either functionally or definitionally, the Corporation was not a "political subdivision" subject to Section 5 of the Act because the statutes relied on by Appellants are limited in their application and are plainly contradicted by numerous other statutes, court decisions, and attorney general opinions, all which clearly distinguish a water supply corporation from a "political subdivision" as a matter of law. (Appellants' App. 6-12). Accordingly, the district court's judgment should be affirmed without further argument.

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

Appellants have set forth only one question for consideration in this appeal, arguing that the district court erred when it found that the Corporation is not a political subdivision within the meaning of Section 5 of the Act. However, a review of the facts of this case and the applicable law make clear that the decision of the district court is correct and that this appeal does not present substantial questions requiring the consideration of this Court.

Appellees would note that Appellants' reference to "drought stricken region" and their characterization of the Corporation as a "bastion of Anglo electoral control" is not only erroneous, but it is irrelevant to the issue they present. Similarly, the Corporation has no "obscure, almost secret voting rules" as implied by Appellants. In fact, as Appellants have repeatedly noted, the Corporation is subject to the provisions of the Texas Open Meetings Act, and the Texas Open Records Act. Tex. Gov't. Code § 551.001 et seq., § 552.001, et seq. (West 2003).

Appellants also complain that the district court inappropriately determined the case summarily. The record is clear that there are no factual disputes which involve substantial and material issues. The functions and characteristics of a non-profit water supply corporation are clearly specified in the law and in the affidavits and briefing considered by the district court.

In the district court, Appellants' sole argument advocating the Corporation's treatment as a "political subdivision" for purposes of Section 5 was based on the theory that because the Corporation was named as a "political subdivision" or "governmental body" in certain Texas statutes, and enjoyed limited ad valorem tax exemption, it automatically was a "political subdivision" subject to the Section 5 preclearance requirements. The district court correctly determined this case as a matter of law considering the very authorities cited by the Appellants and numerous other authorities which clearly distinguish a non-profit water supply corporation from a " political subdivision" as a matter of law. The district court did not engage in a "catch-22 type analysis" in reaching its decision. In this appeal, Appellants for the first time cite "critical facts" as a mere pretext to avoid the district court's judgment with which they disagree. By any reasonable reading of the district court's opinion, it is obvious that the district court's reasoning is clear and correct and should be affirmed by this Court.

ARGUMENT

I. East Rio Hondo Water Supply Corporation is not a Political Subdivision Within the Meaning of Section 5 of the Voting Rights Act.

Even the broadest reading of the term "political subdivision" in the context of Section 5 will not extend coverage of the Act to a non-profit corporation like East Rio Hondo Water Supply Corporation which is created by individuals in the same manner as other non-profit corporations. It is undisputed that the Corporation has no power to collect or assess taxes, has no authority to issue tax exempt bonds, has no authority to conduct registration for voting, has no public officials, has limited exemption from ad valorem taxes, and has no governmental immunity from suit. The Corporation is clearly not an entity vested with all of the rights, privileges and benefits granted to governmental entities.

All of the cases cited by Appellants in support of their argument, and the characteristics of the entities referred to therein, are clearly distinguishable from the characteristics of East Rio Hondo Water Supply Corporation. The Edwards Aquifer Authority was specifically created by the Texas legislature as a state regulatory body to govern counties situated above the Edwards Aquifer. State of Texas v. U.S., 866 F. Supp. 20 (D.D.C. 1994). The Salt River Project Agricultural Improvement and Power District is "a public, political, taxing subdivision of the state and a municipal corporation". Smith v. Salt River Project Agr. Imp. and Power Dist., 109 F.3d. 586, 593 (9th Cir. 1997). The Caledonia Natural Gas District conceded that it was a political subdivision of the State of Mississippi. Moore v. Caledonia Natural Gas Dist., 890 F. Supp. 547 (N. D. Miss. 1995). Thus there was no serious examination in those cases of the coverage issue which is the only question presented in this case.

In this case, the relevant facts were undisputed. East Rio Hondo Water Supply Corporation is a non-profit water supply corporation which is organized and operates under the

provisions of Chapter 67, Texas Water Code (formerly Article 1434a, Rev. Civ. Stat. Tex.) and the general provisions of the Texas Non-Profit Corporation Act, Article 1396-1.01, et seq., Tex. Rev. Civ. Stat. See, Tex. Water Code § 67.001, et seq. (West 2003); Tex. Rev. Civ. Stat. art.1396-1.01, et seq. (West 2003). The Corporation is a "retail public utility" pursuant to § 13.002, Texas Water Code, which defines "retail public utility" as follows:

> "Retail public utility" means any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water, service or sewer service or both, for compensation."

Tex. Water Code § 13.002 (West 2003). This definition, like many other Texas statutes cited by the district court, clearly distinguishes a non-profit water supply corporation from a political subdivision. East Rio Hondo Water Supply Corporation is governed by a Board of Directors elected by its members. Tex. Water Code § 67.005 (West 2003). The Board of Directors adopts written procedures for nomination and election of its Directors by the Members of the Corporation. These procedures are contained within the Corporation's bylaws. Like other non-profit corporations, no state law prescribes the specific procedure for the election of the Corporation's Board of Directors. Tex. Water Code § 67.007 (West 2003). The provisions of the Texas Election Code do not apply to the Corporation's elections. No provision of Texas election law is implicated in this case.

The district court's analysis of this case is entirely

consistent with federal and state law. Appellants complain that the district court incorrectly relied on Salyer arguing that the case did not address the scope of the Voting Rights Act. The district court's analysis using the Salyer decision in determining the characteristics of a political subdivision was entirely appropriate given the sole issue in this case. Appellants' mischaracterization of the district court's use of Salyer, which clearly noted that it was a suit under 42 U.S.C. § 1973, is misguided.

Appellants next attack the district court's analysis of the Tarrant County Water Supply Corporation case arguing that Texas law has changed to alter the status of non-profit water supply corporations, and reciting the same list of statutes repeated throughout their briefing. This is plainly an incorrect argument and the district court correctly rejected this argument. As set forth in the district court's opinion, non-profit water supply corporations are defined under Texas law to be a "political subdivision" for the limited purpose of certain specific statutory schemes, such as the water financing activities of the Texas Water Development Board under Chapters 15-17 of the Texas Water Code. See, Tex. Water Code §§ 15.001(5); 16.001(7), and 17.001(6) (West 2003). The district court noted that each of these statutes limit use of the definition to "in this chapter." Tex. Water Code §§ 15.001, 16.001 and 17.001 (West 2003). The rationale for including non-profit water supply corporations within the definition of "political subdivision" for purposes of these statutory schemes is explained in a Letter Opinion of the Texas Attorney General, cited by the district court, wherein the Attorney General held that " a non-profit water supply corporation created pursuant to that statute [Article 1434a, V.T.C.S., now Chapter 67, Water Code] is not a political subdivision or a municipal or governmental agency." Op. Atty. Gen. 1995, No. JM-011. By expressly including non-

profit water supply corporations in the definitions of "political subdivision", the legislature enabled them to participate in particular water development programs. However, the use of a specialized definition of "political subdivision" in particular statutes does not change the meaning of that term elsewhere. Op. Atty. Gen. 1995, No. JM-011.

Appellees would note that Texas courts have consistently interpreted the attributes of political subdivisions to include: geographical area and boundaries, public elections, public officials and the power to assess and collect taxes. Monsanto v. Cornerstone Mun. Utility Dist., 865 S.W.2d 937, 940 (Tex. 1993). The use of the term "political subdivision" to include non-profit water supply corporations must be express, by clear act of the Texas Legislature; it will not be implied . See, Tarrant County Water Supply Corporation v. Hurst-Euless Bedford Ind. Sch. Dist., 391 S.W.2d 162 (Tex. Civ. App. - Ft. Worth 1965, writ ref'd. n.r.e.). Appellants' attempt to impose the requirements of the Voting Rights Act on a non-profit corporation based solely on definitional language limited to certain financing arrangements is without any legal merit.

Appellants further argue that the Corporation is a political subdivision pursuant to the Act because it is subject to the provisions of the Texas Open Meetings Act and Texas Open Records Act. Tex. Gov't. Code § 551.001, et. seq. and § 552.001, et. seq. (West 2003). Appellants neglect to note that these non-profit corporations are subject to these Acts because they elect to become subject to them by accepting federal funds or choosing to apply for an ad valorem tax exemption under § 11.30 of the Texas Property Tax Code. These entities are not inherently governmental as alleged by Appellants. Also, as noted by the district court, both the Open Records Act and Open Meetings Act define the term "governmental body" to

include a broad range of entities and each statute makes a clear distinction between a water supply corporation and political subdivision. Under Appellants' argument, all of the various entities listed as a "governmental body" under these Acts would automatically be subject to Section 5 of the Act. Such a result was correctly rejected by the district court.

Appellants' brief repeatedly cites those few statutes which include a water supply corporation in the definition of "political subdivision" while completely ignoring the many Texas statutes cited by the district court which expressly make a distinction between non-profit water supply corporations and "political subdivisions" (Appellants' App. 8-9). See, Texas Water Code § 67.002, 67.009, 67,010, 67.0105 and 67.011 (West 2003).

Appellees fail to point out that the Corporation is not a governmental unit under the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code § 101.001 (West 2003) (water supply corporation not included in definition of political subdivision). The Corporation is not exempt from ad valorem taxation pursuant to § 11.11 of the Texas Property Tax Code which exempts property owned by the State of Texas or a political subdivision. Tex. Prop. Tax Code § 11.11 (West 2003).

As an entity which is a non-profit corporation, which operates as a retail public utility, which is not political, which has no power to assess or collect taxes, which is not subject to the Texas Election Code, and which is not defined as a "political subdivision" or governmental unit by numerous Texas statutes, there is no support for a conclusion that East Rio Hondo Water Supply Corporation is a "political subdivision" subject to the terms of the Voting Rights Act.

II. Summary Judgment was Appropriate

The district court appropriately granted summary judgment in favor of Appellees. There are no material facts in dispute in this case. Appellants' argument is solely based on the inclusion of water supply corporations in various definitions used in Texas statutes. The district court correctly reviewed relevant Texas statutes and the undisputed facts of the case. The judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, Appellants' claim is plainly insubstantial and Appellees respectfully submit that the judgment of the District Court for the Southern District of Texas be affirmed.

Respectfully submitted,

J. W. DYER
Counsel of Record

SHARON ALMAGUER

DYER & ASSOCIATES
3700 N. 10th, Suite 105
McAllen, Texas 78501
(956) 686-6606
(956) 686-6601 Fax
dyerfirm@aol.com

Attorneys for Appellees

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